RENDERED: October 30, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-002527-MR

UNISIGN, INC. APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE DAVID L. KNOX, JUDGE
ACTION NO. 97-CI-00210

COMMONWEALTH OF KENTUCKY, APPELLEE
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

OPINION

AFFIRMING

** ** ** ** **

BEFORE: HUDDLESTON, KNOPF, and MILLER, Judges.

MILLER, JUDGE. Unisign Corporation, Inc. (Unisign), brings this appeal from an August 29, 1997 order of the Scott Circuit Court granting summary judgment and a permanent injunction. We affirm.

On February 18, 1997, Unisign filed applications with the Kentucky Transportation Cabinet, Department of Highways (Cabinet) for permits to erect "off-premise" billboards[1]. The proposed location for these billboards was adjacent to and within 660 feet of I-75, an interstate highway, in Scott County, Ken-

[1]Off premise billboards are those setting forth information pertaining to businesses or entities not located on the property where the billboards are situated.

tucky. Pursuant to Ky. Rev. Stat. (KRS) 177.841, signs within 660 feet of interstate highways are prohibited. In order to erect the billboards in question, Unisign sought to come within the exception to that statute found in KRS 177.860(4) pertaining to "commercially and industrially developed areas." On April 8, 1997, the Cabinet notified Unisign that its applications were denied on the basis that the proposed site did not qualify as a "commercially or industrially developed area." KRS 177.860(4). Specifically, the locations, as determined by the Cabinet, did not contain ten (10) separate commercial or industrial enterprises located within 1,620 feet of each other as dictated by 603 Ky. Admin. Reg. (KAR) 3:080.

Despite its failure to obtain the appropriate permits, Unisign erected two structures and began construction of a third at the proposed location. On May 9, 1997, the Cabinet filed a verified complaint claiming that the structures were in violation of the Kentucky Billboard Act (codified in KRS 177.830 - .890). The complaint further requested a permanent injunction against Unisign for removal of its structures. Unisign filed a counterclaim on May 15, 1997, maintaining that the regulations enunciated in 603 KAR 3:080 were invalid and unenforceable. Initially, a restraining order barred further construction of the billboards and placement of advertisements on the existing structures. A temporary injunction was granted on July 23, 1997, after which the Cabinet moved for summary judgment. Said motion was granted, and a permanent injunction was entered on August 29, 1997, requiring Unisign to remove the structures. This appeal followed.

Unisign asserts the following points of error: (1) that KRS 177.860(4) constitutes an impermissible delegation of legislative authority; (2) that, alternatively, if there were no improper delegation of authority, 603 KAR 3:080 § 1(8) exceeds the delegation; (3) that the permanent injunction was prematurely issued; (4) that the circuit court failed to join an indispensable party; and (5) that the Cabinet selectively enforced the statute and its regulations.

For a better understanding of the issues herein, we set forth, ***in relevant parts***, the applicable statutes and regulations.

KRS 177.841

> Except as otherwise provided in KRS 177.830 to 177.890, the erection or maintenance of any advertising device upon or within six hundred and sixty (660) feet of the right of way of any interstate highway or federal aid primary highway is prohibited.

KRS 177.860

> The commissioner of the Department of Highways shall prescribe by regulations reasonable standards for the advertising devices hereinafter enumerated, designed to protect the safety of and to guide the users of the highways and otherwise to achieve the objectives set forth in KRS 177.850, and the erection and maintenance of any of the following advertising devices, if they comply with the regulations, shall not be deemed a violation of KRS 177.830 TO 177.890:
>
> . . .
>
> (4) Advertising devices which otherwise comply with the applicable zoning ordinances and regulations of any county or city, and which are to be located in a commercially or industrially developed area, in which the commissioner of highways determines, in exercise of his sound discretion, that the location of

> the advertising devices is compatible with the safety and convenience of the traveling public.
>
> 603 KAR 3:080 §1
>
> (8) "Commercially or industrially developed area" means, as it is applied to interstate and parkway highways only:
>
> (a) Any area within 100 feet of, and including any area where there are located within the protected area at least ten (10) separate commercial or industrial enterprises, not one of the structures from which one (1) of the enterprises is being conducted is located at a distance greater than 1620 feet from any other structure from which one (1) of the other enterprises is being conducted; and . . .

We first address the constitutionality of KRS 177.-860(4) in its attempt to delegate legislative authority. It is our opinion that Diemer v. Commonwealth of Kentucky, Transportation Cabinet, Department of Highways, Ky., 786 S.W.2d 861 (1990), is controlling. In Diemer, the Cabinet filed two declaratory judgment actions seeking to have certain billboards declared in violation of the Kentucky Billboard Act and an injunction to require removal of the signs. The specific statutory provision alleged to have been violated was KRS 177.841(2)which reads:

> (2) The erection or maintenance of any advertising device located outside of an urban area and beyond six hundred and sixty (660) feet of the right-of-way which is legible and/or identifiable from the main traveled way of any interstate highway or federal aid primary highway is prohibited with the exception of:
>
> (a) Directional and official signs and notices;
>
> (b) Signs advertising the sale or lease of property upon which they are located; or

> (c) Signs advertising activities conducted on the property on which they are located.

KRS 177.830(10) provided:

> (10) "Urban areas" means those areas which the secretary of transportation, in the exercise of his sound discretion and upon consideration being given to the population within boundaries of an area and to the traveling public, determines by official order to be urban; provided, however, that any such determination or designation of the secretary shall not, in any way, be at variance with the federal law or regulation thereunder or jeopardize the allotment or qualification for federal aid funds of the Commonwealth of Kentucky.

The billboards in Diemer were located outside of an "urban area" as defined in 603 KAR 3:010 §2(17) and 3:020 §2(20), promulgated pursuant to KRS 177.830(10).

The main issues in Diemer were whether KRS 177.841(2) was "so vague and overbroad as to be a constitutionally impermissible exercise of police power, and whether the statute as worded represents an unconstitutional delegation of legislative power to executive authority." The Kentucky Supreme Court responded in the affirmative to each of these questions.

Noting the duty of the legislature to define statutory terms "so that persons of ordinary intelligence do not have to guess at their meaning," the Diemer Court determined that the term "urban area," as found in KRS 177.841(2), was subject to many interpretations depending upon one's viewpoint. It stated that "[u]sing the term 'urban' to characterize an area presents almost limitless problems with regard to density, geographic relationship, and the character of the habitation." Accordingly, the Court held KRS 177.841(2) to be vague and overbroad.

The Diemer Court further ruled that the legislature could not cure said defect by transferring to the secretary of transportation (secretary), the power to define the term urban area. The Court reminded us of Kentucky's strict adherence to the separation of powers doctrine under the Kentucky Constitution §§27 and 28. It emphasized that under this doctrine, the duty of the legislature to define statutory terms is nondelegable. In Diemer, the secretary was given virtually unlimited power to define the statutory term in question. Hence, such delegation was deemed an unconstitutional delegation of legislative authority.

We believe Diemer sufficiently analogous to the case at hand. It is our opinion that in the case sub judice, the legislature failed to sufficiently define the term *commercially and industrially developed area* as found in KRS 177.860. As in Diemer, a person of ordinary intelligence would have to guess at its meaning, it being subject to many interpretations. Furthermore, the term raises numerous questions of density and geographic relationship.

The legislature failed to define the term and, as in Diemer, delegated that authority to an administrative agency. The Commissioner of the Department of Highways (commissioner) was granted broad discretion to define the term and was restricted only by the requirement that the regulations be reasonable and designed to protect and guide the users of the highway. This unfettered grant of authority causes the entire prohibitive power

of the statute to lie with the commissioner and, thus, is impermissible.

In sum, we conclude that KRS 177.860(4) is indeed unconstitutionally vague and overbroad. It fails to put a person of ordinary intelligence on notice as to what constitutes a "commercially or industrially developed area" for the purpose of erecting billboards. Furthermore, such defect cannot be cured by transferring to the commissioner the power to define the term. Such a transfer of authority is an unconstitutional delegation of legislative power.

Having held KRS 177.860(4) unconstitutional, Unisign's assertion that 603 KAR 3:080 §1(8) exceeded statutory authority is moot.

We deem Unisign's argument alleging the premature issuance of an injunction as without merit. KRS 177.830 clearly states that an advertising device includes "structure[s] erected or used in connection with the display of any device and all lighting or other attachments used in connection therewith [emphasis added] . . . ." Unisign's applications to the department and the leases entered into by Unisign and the landowners clearly indicate that the purpose of erecting the structures in question was to display advertising. Hence, they were erected "in connection" with the display of advertising devices. As such, it is our opinion that the circuit court did not err by issuing said injunction.

Next, we dispense with Unisign's contention that the circuit court committed reversible error when it failed to join the landowners as indispensable parties. Under the precepts of Commonwealth of Kentucky, Department of Fish and Wildlife Re-

sources v. Garner, Ky., 896 S.W.2d 10 (1995), it is our opinion that the landowner is not an indispensable party to this lawsuit. Ky. R. Civ. P. (CR) 19.01.

Last, as to Unisign's argument regarding selective enforcement of the statutes and regulations in question, we find nothing in the record to indicate this issue was preserved for appellate review; nor does Unisign direct us to same. As such, it is rejected. See Port v. Commonwealth, Ky., 906 S.W.2d 327 (1995), Commonwealth v. Duke, Ky., 750 S.W.2d 432 (1988), Daugherty v. Commonwealth, Ky., 572 S.W.2d 861 (1978).

In conclusion, although we disagree with the circuit court that 603 KAR 3:080 §1(8) is constitutional and the product of a constitutional delegation of authority, we affirm the case for other reasons. See Revenue Cabinet, Commonwealth of Kentucky v. Joy Technologies, Inc., Ky. App., 838 S.W.2d 406 (1992). Because the exception under which Unisign seeks to erect its billboards is void, the general prohibition against billboards within 660 feet of the interstate highways precludes erection of the billboards. We believe this opinion is in conformity with KRS 446.090 pertaining to the severability of statutes. See Puckett v. Miller, Ky., 821 S.W.2d 791 (1992).

For the foregoing reasons, we affirm the Order of the Scott Circuit Court.

HUDDLESTON, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN RESULT.

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